

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
TEMIMA SPETNER, : 19-cv-00005-EK-JAM  
:   
Plaintiff, :   
:   
- versus - : U.S. Courthouse  
: Brooklyn, New York  
PALESTINE INVESTMENT BANK, :   
: May 13, 2024  
Defendant : 12:26 p.m.  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE ERIC R. KOMITEE  
UNITED STATES DISTRICT JUDGE

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1 THE COURT: Please be seated.

2 THE CLERK: Civil Cause for Oral Argument,  
3 docket number 19-cv-00005, *Spetner, et al. v. Palestine*  
4 *Investment Bank*.

5 Will the parties please state their appearances  
6 for the record starting with the plaintiff?

7 MR. RADINE: Good afternoon, your Honor.  
8 Michael Radine of Osen LLC for the plaintiffs. I'm  
9 joined today by Dina Gielchinski and Ari Ungar.

10 THE COURT: Good afternoon.

11 MR. BERGER: Good afternoon, your Honor.  
12 Mitchell Berger from Squire Patton Boggs for Palestine  
13 Investment Bank and with me are my colleagues Joseph  
14 Alonzo and Alex Hyman.

15 THE COURT: Good afternoon to you all as well.  
16 All right. I thought I logged in here successfully but  
17 apparently not.

18 We're here for oral argument on the 12(b)(6)  
19 side of defendant's motion to dismiss, now the second  
20 amended complaint. Both sides should think of themselves  
21 as having precisely 30 minutes for their arguments.  
22 We're going to wrap at 1:30. And if the defense wants to  
23 reserve ten minutes or so for rebuttal, you should feel  
24 free to do that. But let's begin with the defense,  
25 please.

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1 MR. BERGER: Great. Thank you, your Honor.  
2 And I will please then reserve ten minutes for rebuttal.  
3 And I would say this. I'm mindful of the southern  
4 district's observation in *King v. Habib Bank* that  
5 liability for banking services allegedly provided to  
6 support a terrorist group is more generally properly  
7 analyzed under JASTA aiding and abetting than under ATA  
8 primarily liability. But of course here we've got two  
9 primary liability counts before we even get to the JASTA  
10 count. But if the Court doesn't have a preference, I'll  
11 just take it in the order in which they appear in the  
12 complaint.

13 THE COURT: That's fine.

14 MR. BERGER: All right. Thank you, your Honor.

15 Well, the second amended complaint fails legal  
16 standards for all three counts; conspiracy, 2339A  
17 material support, and JASTA aiding and abetting.

18 First up, the conspiracy count fails because  
19 the second amended complaint does not allege that  
20 Palestine Investment Bank acted with the required  
21 specific intent that the conspiratorial goal be  
22 completed.

23 As I know your Honor appreciates, specific  
24 intent is the test for the essential conspiracy element  
25 of agreement. You can find that in the *Kemper* case we

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1 cite at 911 F.3d 395, but it's in accord with the Second  
2 Circuit's decision in *Freeman*, 57 F.4th 80, and with  
3 Second Circuit conspiracy law, a case including *The*  
4 *United States v. Aleskerova*, 300 F.3d 286, 292.

5 For a 2339A conspiracy, which is what we have  
6 year, the conspiratorial goal must be to provide material  
7 support for terrorists. The second amended complaint  
8 makes no factual allegations in which the Court could  
9 infer specific intent by PIB to commit or support  
10 terrorist acts. And in fact, the second amended  
11 complaint doesn't use the phrase intent or specific  
12 intent in alleging what PIB did. He relies merely on  
13 knowledge. But knowledge is not enough for a 2339A  
14 conspiracy.

15 The *Kemper* case, which involved a 2339A  
16 conspiracy, nailed this point saying, this is again at  
17 page 395 of 911 F.3d, "A person who is indifferent to the  
18 goals of the conspiracy does not become a party to the  
19 conspiracy merely because that person knows that his or  
20 her actions might somehow be furthering that conspiracy."  
21 So --

22 THE COURT: What is the state of your client's  
23 obligations with respect to international AML/KYC  
24 requirements.

25 MR. BERGER: Right. So your Honor, I think

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1 that's an excellent question because it has two aspects.  
2 One is now as opposed to then.

3 THE COURT: Then.

4 MR. BERGER: And then the answer is there is  
5 limited, if any, requirements within the Palestinian  
6 territories for Know Your Customers. That became a later  
7 aspect of --

8 THE COURT: I am not limiting my question to  
9 regulations emanating from within the Palestinian  
10 territories. This bank had correspondent accounts in  
11 Jordan, was obviously connected to the international  
12 financial system. My question is what obligations did it  
13 have from any source?

14 MR. BERGER: So the short answer is for  
15 checking which is what we're dealing with here. So --

16 THE COURT: I'm not talking about checking  
17 either. You keep changing the hypo. There are -- KYC  
18 requirements apply at the account opening stage and every  
19 day thereafter. What were the KYC requirements, if any,  
20 that applied to your customer during the period?

21 MR. BERGER: Sorry. In 2001 and 2002 the  
22 answer is none.

23 THE COURT: None.

24 MR. BERGER: None.

25 THE COURT: You could open an account for

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1 anybody?

2 MR. BERGER: It was up to the banks. First of  
3 all, there's nothing in the second amended complaint that  
4 even offers an allegation on this subject.

5 THE COURT: I think there -- well, we can  
6 debate the sufficiency of the allegation, but I think  
7 that's factually incorrect, right? The complaint says in  
8 paragraph 648, "As a financial institution that offered  
9 U.S. dollar denominated accounts to its customers and  
10 utilized U.S. correspondent banking relationships,  
11 defendant Palestine Investment Bank was aware of  
12 international banking standards including the above  
13 referenced Know Your Customer and enhanced due diligence  
14 guidelines." That follows a long discussion about what  
15 the Basel Committee has said.

16 So what is the state of -- were the Basel  
17 standards -- you're saying they were completely optional  
18 as to PIB?

19 MR. BERGER: Yes, they were. And indeed, your  
20 Honor, I know you don't want to hear me quibble with you,  
21 but I don't think I'm quibbling. The language you read  
22 didn't say PIB was bound by international --

23 THE COURT: No, I understand that.

24 MR. BERGER: It says aware of international  
25 banking standards. And indeed, they know, if you look at

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1 footnote 2 on page 11 of the opposition brief, they know  
2 they've got a problem. They include information that  
3 footnote 2, page 11, is talking about what PIB must have  
4 done when processing checks.

5 But the short answer is nothing in the amended  
6 complaint says that in 2001 and 2002, which is the  
7 relevant time period for this case, that PIB had or is  
8 bound by any international banking standards. To the  
9 extent that PIB's correspondent banks were engaged in  
10 U.S. transactions, wire transfer transactions, then those  
11 banks would certainly have had to comply with whatever  
12 they were required to. But as you know from the  
13 jurisdictional phase in this case, PIB wasn't even doing  
14 that.

15 So the short answer is nothing as we read it in  
16 the complaint alleges that PIB was bound to do this and  
17 there are --

18 THE COURT: I don't think you should -- so it's  
19 possible that this question could be answered by  
20 reference not only to specific allegations in the  
21 complaint, but also by reference to anything of which the  
22 Court might take judicial notice. And you know, U.S.  
23 treaties, for example, I would think would be something  
24 that the Court could take judicial notice of. I don't  
25 know how that applies to international banking standards

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1 at the moment, but the Basel Committee was headquartered  
2 at the bank for international settlements and the BIS was  
3 a consortium of central banks. Do you know if the PMA  
4 was a member of that consortium?

5 MR. BERGER: I do not believe they were at the  
6 time but I'm happy to provide a post argument argument  
7 submission that answers that question if it's  
8 consequential for your Honor as it appears to be.

9 I would say only while we're talking about the  
10 conspiracy count at best what it shows is knowledge and  
11 it's not even plausibly pled. And it says they were  
12 aware of that knowledge of international banking  
13 statements. Knowledge is simply not enough for a  
14 conspiracy count.

15 THE COURT: Well, I mean we started this whole  
16 conversation because you said there's nothing in the  
17 second amended complaint from which one could infer a  
18 desire on PIB's part to see this endeavor succeed, this  
19 endeavor to blow up civilians on buses succeed. And it  
20 seems potentially relevant in that regard that if the PIB  
21 was willing to put its status instead, and its standing,  
22 in the international banking community at risk to do this  
23 kind of thing, that that might be some indication of its  
24 desire. You don't expect the bank to put out a press  
25 release that says we would like to see the second



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1 intifada succeed and in that vein we're happy to put out,  
2 to facilitate martyr payments and do anything else that  
3 we possibly can. Right? We're going to have to infer  
4 such a desire, if we see one, from the circumstances.  
5 And so in that vein it is relevant to me what legal or  
6 even prudential incentives they had as described in the  
7 complaint and anything else of which I might take  
8 judicial notice.

9           And we see that in the *Kaplan* case, right, that  
10 Judge Pierce is saying these people had Know Your  
11 Customer obligations in a way that seemed important to  
12 the Circuit as well.

13           MR. BERGER: So there's two or three aspects of  
14 what your Honor asked that I'd like to address and take  
15 them in turn.

16           First of all, the Court can draw inferences and  
17 no one would expect any bank to put out a statement that  
18 says here's our intent. On the other hand, there is a  
19 reason why the law says there must be a difference  
20 between knowledge and intent, and intent is what is  
21 required for conspiracy. And they don't even bother to  
22 allege intent. Your Honor, they don't even ask you to  
23 draw specific intent. What they argued is that they had  
24 knowledge. Knowledge is simply as a matter of law not  
25 enough for a conspiracy.

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1           So even with a 12(b)(6) obligation to read  
2 things favorably to plaintiffs it would take a heroic act  
3 of gymnastics to bend over backwards to infer intent when  
4 only knowledge is pled.

5           Further, your Honor mentioned *Kaplan*. What was  
6 dispositive in *Kaplan*, and the Court mentioned this, and  
7 *Honickman* picked up in this in discussing what was going  
8 on in *Kaplan* is what was the difference maker in *Kaplan*?  
9 It was not so much that they knew about international  
10 banking standards, but there was a plausibly pled  
11 allegation that, and I'm quoting here from *Honickman* in  
12 terms of how it's analyzing *Kaplan* --

13           THE COURT: That the bank expanded its limits?

14           MR. BERGER: It says that -- it noted that the  
15 martyr payment theory in *Kaplan* was found sufficient  
16 because the bank, and here I'm quoting, "permitted the  
17 laundering of money in violation of regulatory  
18 restrictions meant to hinder the ability of FTOs to carry  
19 out terrorist attacks and also made exceptions to pay to  
20 the customers." Neither of those is present in this  
21 case. And in fact, here's the key point. And I guess  
22 because --

23           THE COURT: But there are distinctions -- so  
24 what I read *Twitter* to say, and I realize *Twitter* is  
25 about aiding and abetting liability, not material

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1 support. But the word aid and the word support are close  
2 cousins let's say at least. You're looking at a sliding  
3 scale where the closer the bank is to the conduct, the  
4 less specificity we require by way of knowledge and  
5 intent. And the more passive and incidental the bank or  
6 other actor is to the conduct, the more we require by way  
7 of knowledge and intent. And I think there might be a  
8 distinction, I'm not as crystal clear on the facts of  
9 *Kaplan* as I will be, but I think the clients there were  
10 not as clearly alleged to be participating as Mr. Salem  
11 is here.

12 MR. BERGER: So two points there, your Honor.  
13 Number one, they were alleged to have been Hezbollah  
14 fronts in *Kaplan* and that they were well known  
15 Hezbollah --

16 THE COURT: But Hezbollah funds for what  
17 purpose?

18 MR. BERGER: For the purpose of waging the 2006  
19 rocket attacks that occurred that were the subject of all  
20 of the LCD litigations.

21 THE COURT: What were the five clients in  
22 *Kaplan* specifically alleged to have done? So here you've  
23 got Mr. Salem, who is PIB's client, is alleged to be the  
24 guy who makes the martyr payments, at least the final leg  
25 of the martyr payments. And that's pretty direct

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1 participation. What was the equivalent, if there was  
2 one, in *Kaplan*?

3 MR. BERGER: Well, so that's what's so  
4 important, your Honor, which is the difference is your  
5 Honor is focusing on what the bank did in *Kaplan*, right?  
6 And here, the equivalent is what did PIB do? The  
7 remitters here, Mr. --

8 THE COURT: No, I'm focusing on what the bank's  
9 client did. I just asked you a question about -- I just  
10 framed the statement about Mr. Salem's personal  
11 involvement --

12 MR. BERGER: Right.

13 THE COURT: -- in the suicide bombing process  
14 and I'm asking you what were the clients, the five  
15 clients', involvement in *Kaplan*.

16 MR. BERGER: Yeah, I don't -- your Honor, I  
17 apologize. I don't have a specific answer to that. My  
18 recollection is that the five clients were alleged to be  
19 Hezbollah fronts that moved money to Hezbollah with the  
20 benefit of exceptions granted to favor them by LCD so  
21 that money went into Hezbollah's pocket to wage rocket  
22 attacks.

23 THE COURT: Right. But there's a difference  
24 perhaps, and I think *Twitter* counsels that when we think  
25 about okay, what is somebody's knowledge and intent,

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1 we're on that sliding scale that I described, you know,  
2 helping to funnel money to Hezbollah generally so that  
3 Hezbollah can buy computers or even weapons seems to me  
4 at least a half step removed from what Mr. Salem is  
5 alleged to be doing which is specifically rewarding the  
6 families of the people actually carrying out attacks.

7 MR. BERGER: If I may address the various  
8 aspects of the question, your Honor, and I've got a lot  
9 to say on it but I don't want to -- I want to be  
10 responsive to the Court's question.

11 THE COURT: Yes.

12 MR. BERGER: But here's the deal which is I  
13 frankly think you could put conspiracy aside. It would  
14 take a heroic effort to say there's specific intent  
15 plausibly pled. Knowledge is what I think we are dealing  
16 with. And your Honor has fair questions about what do I  
17 do about the alleged knowledge. And I'd like to give you  
18 an answer that parses the actual second amended complaint  
19 because I think the, for lack of a better word, the sort  
20 of gestalt in your Honor's offering about how you're  
21 reading the second amended complaint is undermined by the  
22 specific allegations in the second amended complaint  
23 itself and would not give the type of knowledge required  
24 to PIB.

25 Let me give you some for instances if I may.

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1 The second amended complaint does not allege any public  
2 statement by Salem supporting terrorist attacks or  
3 revolts. When you look, as I know the Court has, at  
4 paragraphs 504, 506, and 535 to 536 of the second amended  
5 complaint, those are the only paragraphs that attribute  
6 views or statements through Rakad Salem. Not one of  
7 those statements is supporting terrorism. What they  
8 merely do is express a --

9 THE COURT: But why does it have to be his own  
10 statements? I mean there are all these, and I think  
11 *Kaplan* rejects the approach that you just took, there are  
12 all these press reports all over the world that say that  
13 Salem is handing out millions of dollars in martyr  
14 payments.

15 MR. BERGER: That's not correct as I read the  
16 second amended complaint, your Honor. And I therefore  
17 would try to point out a couple of --

18 THE COURT: What's not correct?

19 MR. BERGER: That the press all around the  
20 world is attributing statements to Rakad Salem supporting  
21 terrorism.

22 THE COURT: You keep changing the hypo. I said  
23 the press all around the world is reporting that Mr.  
24 Salem is facilitating or making millions of dollars in  
25 martyr payments. I didn't say anything about what the

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1 press is reporting Mr. Salem to have said. I'm talking  
2 about what the press is reporting Mr. Salem to have done.  
3 Right?

4 MR. BERGER: So your Honor, both for JASTA --

5 THE COURT: Both what?

6 MR. BERGER: Both for JASTA and for 2339A which  
7 turn to some extent on knowledge, both require actual  
8 knowledge. Your Honor has said, and I hear and I'm  
9 trying to be responsive to this, that the Court would  
10 infer actual knowledge. But of course the Court has to  
11 infer it from something. So let me start with the  
12 various points. Most of the second amended complaint's  
13 public reports are alleged from, as your Honor said,  
14 worldwide media. There has to be a reason to infer, even  
15 under *Kaplan*, that the bank would have read media outside  
16 of Palestine.

17 Second, the Palestinian media reports, the ones  
18 you'll see in paragraphs 510 --

19 THE COURT: Well, if the Daily Telegraph knows  
20 this, it seems you've got the San Francisco Chronicle,  
21 the French Press agency that I won't try to pronounce the  
22 name of, the Daily Telegraph, the AP, and on and on.  
23 Al-Hayat al-Jadida, a leading Palestinian newspaper, is  
24 reporting on Saddam Hussein's inquiries in suicide terror  
25 payments.

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1 MR. BERGER: Your Honor, I couldn't tell you  
2 the last time I looked at the Daily Telegraph or the San  
3 Francisco Chronicle. There has to be a real world basis  
4 from the Court to infer --

5 THE COURT: Yes. I mean this really does go  
6 back to a little bit the question of what obligations,  
7 legal or prudential, your client has or had. It seems to  
8 me in 2001 it would have been the small minority of  
9 participants in the international banking system who were  
10 truly at liberty to just remain blissfully ignorant of  
11 who they were banking with. But I think we may need to  
12 bear down on that via some supplemental briefing.

13 MR. BERGER: Your Honor, I mean I think one of  
14 the things that your Honor recognized in the  
15 jurisdictional decision is that this bank was in fact  
16 uniquely set up. It was not participating in the  
17 international banking system. I understand the Court of  
18 Appeals said --

19 THE COURT: Yes, I got overruled.

20 MR. BERGER: -- by way of agency that they are  
21 deemed to have, but that doesn't mean that in the real  
22 world they're participating in the international banking  
23 system. They didn't have a correspondent account. And  
24 respectfully --

25 THE COURT: They did have an international



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1 correspondent account.

2 MR. BERGER: They did not have an international  
3 correspondent account.

4 THE COURT: They did have an international  
5 correspondent account.

6 MR. BERGER: Oh, with Jordan.

7 THE COURT: Yes.

8 MR. BERGER: With the bank in Jordan. But they  
9 did not process through the United States and were not  
10 subject therefore to what would normally have been in  
11 place at that time for international wire transfer.

12 Your Honor, I do think it's important, and  
13 again --

14 THE COURT: International dollar denominated  
15 wire transfers.

16 MR. BERGER: Right. None of which --

17 THE COURT: What about euros?

18 MR. BERGER: None is alleged here in the  
19 complaint. Your Honor, I understand --

20 THE COURT: I understand the law -- we're  
21 having a question about, a conversation about what the  
22 law was.

23 MR. BERGER: Right.

24 THE COURT: And you don't really need to allege  
25 law in the complaint.

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1 MR. BERGER: You don't need to allege law in  
2 the complaint but you do need to allege both for the  
3 2339A material support count and for the JASTA count  
4 actual knowledge. I understand the Court can draw an  
5 inference of actual knowledge. There has to be something  
6 more than Basel standards out in the ether from which the  
7 Court could infer actual knowledge on the part of PIB as  
8 to Mr. Salem.

9 It is important because I do think there's a  
10 lot of blurring in the argument here by the plaintiffs.  
11 The Palestinian media reports alleged in the complaint,  
12 paragraphs 510 and 511, 531, 533 through 34, they don't  
13 allege any support for terrorism by Rakad Salem. The --

14 THE COURT: Yes, they do.

15 MR. BERGER: The question both for the --

16 THE COURT: Are you disputing that making  
17 martyr payments is support for terrorism?

18 MR. BERGER: Yes, your Honor, I am. I have  
19 both a factual answer to that and a legal answer, if I  
20 may.

21 THE COURT: Yes.

22 MR. BERGER: Okay. So factually, the complaint  
23 alleges, and I'll give you the paragraph cites, multiple  
24 reasons why martyr checks were written that have nothing  
25 to do with terrorism. You can find this in paragraph

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1 531, 535, 495, 503, 419 -- I'm sorry, 514, 545, 493, 475.

2 THE COURT: You can stop with the number. Tell  
3 me what the --

4 MR. BERGER: They allege three non-terror  
5 reasons.

6 Number one, advancing Saddam's political  
7 standing with the Palestinians.

8 THE COURT: That's not a non-terror reason.  
9 That reason only works if the terrorist attacks bring  
10 some advancement to Saddam. You're making arguments now  
11 that seem to me to be, just so that I can be totally  
12 transparent with you, arguments that seem factually  
13 preposterous. You're free to do that if you want to --

14 MR. BERGER: I don't believe I'm doing that.

15 THE COURT: -- but the notion that the martyr  
16 payments would not advance the cause of terrorism --

17 MR. BERGER: Yes.

18 THE COURT: -- you're talking about mental  
19 gymnastics. We seem to be off to the gymnastics meet in  
20 that respect.

21 MR. BERGER: Well, your Honor, I apologize if  
22 you think I'm not being straight with the Court. I'm  
23 trying to give you allegations in the second amended  
24 complaint that are directly responsive to the Court's  
25 questions about the martyr payments. And now I'll give

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1 you a legal answer since you said this depends on the  
2 law.

3 In the *Sokolow* case, Judge Daniels held, and I  
4 will quote here, that --

5 THE COURT: In the what case?

6 MR. BERGER: *Sokolow*, S-O-K-O --

7 THE COURT: Who's the judge?

8 MR. BERGER: Judge George Daniels, Southern  
9 District of New York.

10 THE COURT: Okay. Who gets overruled on the  
11 subject in *Kaplan*. I think you're fighting the settled  
12 law as articulated by the Second Circuit in *Kaplan*. They  
13 say -- I mean it's alleged there perhaps more expressly  
14 than it is alleged here, and we'll get to that when we  
15 get to the plaintiffs, but the Second Circuit opinion in  
16 *Kaplan* makes clear what is probably you don't even need  
17 to say it because it's so obvious that knowing that  
18 somebody blows themselves up on a bus that their families  
19 are going to get what is a small or maybe even medium-  
20 sized fortune by Palestinian standards serves to  
21 incentivize future attacks.

22 MR. BERGER: I don't believe that is what the  
23 *Kaplan* case dealt with. Judge Daniels was not --

24 THE COURT: The *Kaplan* case said it explicitly.

25 MR. BERGER: I think what I was quoting from

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1 the *Sokolow* case, and I respectfully suggest it's germane  
2 here, we put it in our brief, but your Honor was looking  
3 for some legal doctrine and I'm trying to provide legal  
4 doctrine. Here's the quote having to do with a martyr  
5 payment in the *Sokolow* case. "Post attack financial  
6 support to the families of terrorists is not sufficient  
7 to demonstrate the defendants were somehow responsible  
8 for the attacks." That's dealing with remitters --

9 THE COURT: If that was a single attack, then I  
10 don't know what the facts were there, if we're talking  
11 about a single attack, then of course it might be true.  
12 But when you're talking about the intifada where a bomb  
13 is going off every X number of days, again, I find it  
14 hard to believe that you even believe in the non-  
15 frivolous nature of the argument you're making here.

16 MR. BERGER: Well, your Honor, that's --

17 THE COURT: I'm not bound by whatever statement  
18 of law comes out of a district court case in the southern  
19 district and I am very much bound by what the Second  
20 Circuit said in *Kaplan* which I think says the opposite of  
21 what you're asking me to conclude here.

22 MR. BERGER: I don't and I'm sorry that your  
23 Honor thinks I'm making frivolous arguments because we  
24 have addressed martyr payment programs in a number of  
25 cases including in *Sokolow*. These cases involve

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1 institutionalized Palestine Liberation Organization  
2 programs to make martyr payments to families of  
3 terrorists during the second intifada, precisely the  
4 question your Honor asked. And it is in that context  
5 that not only the *Sokolow* case held that martyr checks  
6 are not an evidence of responsibility, but the D.C.  
7 district court in the *Shatsky* case, which we cite in our  
8 brief, the district court reached the same conclusion.  
9 Your Honor said --

10 THE COURT: The Second Circuit says, it refers  
11 to the SAC's allegation in that case that the purpose of  
12 that funding and support, i.e. financial support to  
13 wounded Hezbollah terrorists and the families of  
14 Hezbollah terrorists killed in action, the purpose of  
15 that funding in support is to, "provide peace of mind to  
16 current," and then the Second Circuit switches to  
17 italics, emphasis theirs, "current and prospective  
18 Hezbollah terrorists by knowing that they and their  
19 families will be cared for in the event of death or  
20 injury." Citing paragraph 22 of the complaint, emphasis  
21 ours. Emphasis on and prospective terrorists is the  
22 Second Circuit's. So --

23 MR. BERGER: So your Honor, that would take me  
24 back to my point earlier about *Honickman's* explanation of  
25 the *Kaplan* holding to which you adverted. And *Honickman*

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1 at 6 F.4 --

2 THE COURT: I got your argument about  
3 *Honickman*.

4 MR. BERGER: Right. There has to be something  
5 more. We're not talking about the remitter. You're  
6 talking about a bank that processed a remitter's checks  
7 for martyr payment liability. There must be something  
8 more than merely processing a martyr check. And that is  
9 what *Kamna*, for example, tells us. *Kamna* says there's  
10 two aspects to bank liability for aiding and abetting.  
11 One is actual knowledge of customer wrongdoing. And your  
12 Honor, if I'm running over time, I'll wrap it up --

13 THE COURT: Yes.

14 MR. BERGER: -- because I would like to save  
15 time for rebuttal. There has to be actual knowledge of  
16 customer wrongdoing. Your Honor says you can draw an  
17 inference about actual knowledge and you've already drawn  
18 an inference that a martyr check is customer wrongdoing.  
19 So let's move to the second thing *Kamna* requires for  
20 aiding and abetting liability which is quite clear.  
21 There has to be affirmative misconduct, not passive  
22 nonfeasance, by a bank in order to impose liability on a  
23 bank for aiding and abetting. All that is alleged here  
24 is passive nonfeasance by processing checks.

25 I understand your Honor's point about knowledge

## Proceedings

1 and international wire transfers, but that's not what's  
2 at issue here. Checks are at issue. And I would ask  
3 your Honor to take --

4 THE COURT: That's a misconception of how the  
5 international banking system works. If indeed it is the  
6 case that, and we're going to be a down on this now, but  
7 if indeed it is the case that the Palestine Investment  
8 Bank has either legal obligations or strong prudential  
9 incentives to know who his customers are and to keep  
10 narcotics proceeds, terrorism financing, and all the  
11 other horrors out of the banking system, then you  
12 can't, I don't think you can hide behind the notion that  
13 all they're doing here is processing checks. The point  
14 is they have an incentive to know who their customers are  
15 and they know that their customer is somebody engaged in  
16 the facilitation of regular acts of terrorism, and yet  
17 they continue to bank with him even though it puts their  
18 standing perhaps, I don't know, in the international  
19 banking community at risk.

20 Let's hear from the plaintiffs now.

21 MR. RADINE: Thank you, your Honor. So  
22 briefly, and I'll turn to these subjects. As the Court  
23 noted, we've alleged plausibly that PIB conspired the  
24 Saddam Hussein regime to illegally funnel millions of  
25 dollars into the accounts --



Proceedings

1 THE COURT: What do you say about, and what is  
2 the state of the law in 2001 and 2, about PIB's  
3 obligation to know its customers and to keep terrorism  
4 financing from going through its pipeline?

5 MR. RADINE: So a few allegations were made.  
6 First is that Israel publicized its own legal  
7 pronouncements in the Palestinian territories in that  
8 period for this purpose. That's shown in the Politist  
9 (phonetic) declaration.

10 THE COURT: Sorry, where is that?

11 MR. RADINE: The Politist declaration is  
12 Exhibit C.

13 THE COURT: Hold on just one second.

14 MR. RADINE: Sure.

15 THE COURT: Exhibit C. I have your exhibits --  
16 oh to the complaint you're talking about?

17 MR. RADINE: Yes, your Honor.

18 THE COURT: Okay. Exhibit C looks like a  
19 control report of some kind. Oh, that's the amended  
20 complaint. Sorry. Exhibit C is the Politist  
21 declaration. I got it.

22 MR. RADINE: And the Politist declaration  
23 explains --

24 THE COURT: What paragraph?

25 MR. RADINE: This is 17 through 18 and I

## Proceedings

1 believe also 24. The Politist declaration sets out  
2 Israeli law in terms of publicizing Israeli legal  
3 proclamations such as the designation of ALF in the  
4 Palestinian territories.

5 THE COURT: But I'm not asking about  
6 proclamations to the effect that ALF is a terrorist  
7 organization. I'm asking about legal authority or  
8 prudential authority that would have required PIB to know  
9 its customers. I'm saying I'm not asking whether they  
10 knew Mr. Salem was or not. I'm asking whether they had a  
11 legal or prudential obligation to care who their  
12 customers were. What does the complaint say on that?

13 MR. RADINE: Yeah, well at paragraph 650 --  
14 your Honor already noted the paragraphs relating to the  
15 Basel Committee.

16 THE COURT: Yes, but those are -- all that says  
17 is that PIB was aware of what the Basel Committee -- it  
18 was aware of international banking standards but it  
19 doesn't say whether those standards apply.

20 MR. RADINE: Well, in paragraph 650, your  
21 Honor, we also allege that Palestine Investment Bank --

22 THE COURT: That was subject to FATF  
23 regulations.

24 MR. RADINE: Yes, your Honor, which included  
25 Know Your Customer and due diligence needs as well as not

## Proceedings

1 providing banking services to terrorist organizations.

2 THE COURT: Tell me again what FATF -- that's  
3 an international body?

4 MR. RADINE: Yes.

5 THE COURT: And just humor me. Let's say I  
6 wanted to dispute, which I know I'm not at liberty to do  
7 it at the motion to dismiss stage, although I could maybe  
8 if I'm taking judicial notice of something, how do I know  
9 that paragraph 650 is true that PIB was not only aware of  
10 but was also subject to FATF regulations?

11 MR. RADINE: Well, it's our allegation, your  
12 Honor. I haven't seen anything that the Court could  
13 judicially notice that -- I mean submitted by defendant,  
14 that PIB was not subject to any due diligence rules or  
15 FATF specifically.

16 But your Honor, if I may, the Court pointed out  
17 that *Kaplan* notes the defendant LCB's due diligence  
18 program. But that's not a necessity on the knowledge  
19 count. In *Honickman*, where there is no due diligence  
20 allegation at all, makes clear by saying, and I quote,  
21 "As we explain in *Kaplan*, plaintiffs do not need to  
22 allege that the defendant bank knew or should have known  
23 the public sources at the pleading stage. Such a  
24 requirement at this juncture would be too exacting." And  
25 that rule is not dependent on a due diligence allegation.

## Proceedings

1 Again, there was not one in *Honickman*. Instead, the  
2 point that the court makes in *Honickman*, this is in a  
3 footnote that I'm not seeing immediately, is that the  
4 issue is whether it's plausible that a bank would know  
5 something if it wasn't known in the media. The question  
6 is, and I think your Honor alluded this as well --

7 THE COURT: No, but can I -- let me just lay  
8 out my focus here for you so that you can respond to it.  
9 Knowledge and intent are two different things. Right?

10 MR. RADINE: Yes, your Honor.

11 THE COURT: And it was plausibly alleged in the  
12 *Twitter* case that Twitter knew exactly what was going on  
13 on its platform. The Supreme Court maybe tends to fight  
14 that allegation a little bit by saying there are, you  
15 know, billions of tweets a day or whatever.

16 But the Supreme Court also says very clearly  
17 that knowledge is different from intent. You can know  
18 something and be completely indifferent to it. Aiding  
19 and abetting liability requires some expressed or implied  
20 desire to see the venture succeed. And what I've said to  
21 defense counsel that I think it sort of behooves you to  
22 pick up on if you can, is that one way we might infer on  
23 PIB's part more than mere knowledge of who Salem is and  
24 what the ATF is doing is that they had incentives, legal  
25 or prudential, to stay out of the terrorism financing

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1 business. If they had absolutely no such incentives,  
2 then defendant may be right that the most plausible  
3 reading of the complaint is that PIB knew but had no  
4 reason to care one way or the other.

5 If on the other hand PIB had a strong  
6 incentive, legal or prudential, to avoid facilitating,  
7 you know, providing banking services to people who are in  
8 the terrorism financing business, then that makes a much  
9 stronger implied case for intent, a desire to see the  
10 venture succeed, whatever exactly *Twitter* requires.

11 MR. RADINE: Sure. Well, in addition to our  
12 obligations, I think the prudential certainly incentives  
13 that a bank has are pretty clear. There's enforcement  
14 from its regulator, especially during -- which ultimately  
15 is --

16 THE COURT: What regulator? The PMA?

17 MR. RADINE: The PMA, but we allege in the  
18 complaint that Israel is the ultimate authority at that  
19 time certainly of the Palestinian territories. Sorry,  
20 gotten too far.

21 THE COURT: Well, is that right? So did Israel  
22 have KYC requirements or other AML rules to which PIB  
23 would have been subject?

24 MR. RADINE: We allege that they would have  
25 been subject to the proclamations that Israel made and

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1 those were provided. They had knowledge. That's why  
2 they were there being made in the Palestinian  
3 territories. They weren't just --

4 THE COURT: But you're back to the subject of  
5 knowledge rather than intent. You're talking about  
6 proclamations Israel made to the effect that ALF was a  
7 terrorist organization or to the effect that banks had to  
8 stay out of the terrorism financing business?

9 MR. RADINE: I mean that it's illegal to  
10 participate with terrorist organizations. That's why the  
11 announcements are being made. They're illegal for  
12 everybody.

13 THE COURT: Sorry then can you just -- I looked  
14 for a second at the Politist declaration. What is it I'm  
15 supposed to be reading here?

16 MR. RADINE: Well, the declaration walks  
17 through in general the process by which Israeli rules are  
18 proclaimed in the Palestinian territories which are  
19 proclaimed for the purpose of stating that it's illegal  
20 to engage or otherwise do business with these terrorist  
21 groups.

22 THE COURT: Can you show me what paragraph I  
23 should be reading?

24 MR. RADINE: It says -- so in 18, this is a  
25 1967 version of proclamations, orders and notices, are

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1 published into the public and manner at large in the  
2 Palestinian territories. And then I believe that is  
3 increased in -- 21 explains they do this because the  
4 penal provisions of the occupying power, which is to say  
5 punishments for working with a terrorist group, will not  
6 come into force until it's brought to the knowledge of  
7 the inhabitants in their language. That is why Israel  
8 published these proclamations in the Palestinian  
9 territories.

10 THE COURT: The penal provisions enacted by the  
11 operating power don't come into force until there is  
12 knowledge, but don't you then need to tell me that the  
13 penal provisions include AML or KYC regulation?

14 MR. RADINE: Well, they include not assisting  
15 terrorist groups.

16 THE COURT: Where do I see that in them?

17 MR. RADINE: I don't have the exact cite in  
18 front of me, your Honor, but I think the Court will find  
19 that that is the thrust of the Politist declaration.

20 But I would add, as your Honor said, especially  
21 while my colleague looks at the Politist declaration,  
22 that this is also during the second intifada of course.  
23 That is the context. The context is in a time of  
24 incredible violence against civilians in Israel to the  
25 time against Israeli incursions into the Palestinian

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1 territories. This is not something that would have been  
2 lost on anyone in that region whatsoever.

3 THE COURT: The PIB was in the West Bank,  
4 not Gaza?

5 MR. RADINE: And Gaza.

6 THE COURT: West Bank and Gaza. Okay.

7 MR. RADINE: Various branches.

8 THE COURT: Which branch was Mr. Salem alleged  
9 to be a customer of?

10 MR. RADINE: I believe Ramallah al-Bireh.

11 THE COURT: Which is?

12 MR. RADINE: In the West Bank.

13 THE COURT: Okay.

14 MR. RADINE: Again these are not -- you know,  
15 the allegation is that the assistance is being provided  
16 affirmatively. And to the issue of what the Supreme  
17 Court said about knowledge, it said that it is in cases  
18 of passive nonfeasance that a strong showing of  
19 assistance and scienter would thus be required.

20 In cases of affirmative assistance such as  
21 moving Saddam Hussein's money illegally into ALF's  
22 account and then supplying that account with services to  
23 issue martyr checks as well as HLF, that is affirmative  
24 conduct. As Judge Amon said in *Zobay*, there's no reason  
25 to be leery of scienter allegations where the assistance



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1 is affirmative as it is here.

2 In *Twitter*, not only did they not know, there's  
3 not a single allegation in *Twitter* of knowledge of a  
4 specific ISIS use, just that there was a suggestion that  
5 it was happening. In fact, in the Twitter complaint as  
6 the Supreme Court points out, plaintiffs there concede  
7 that the Twitter would shut down ISIS accounts when it  
8 would find them and their allegation is simply they  
9 didn't try hard enough to chase down every last one.

10 THE COURT: Is somebody at your table looking  
11 for what I've described in the Politist declaration?

12 MR. RADINE: So yes, I'm reading now from 31.  
13 This is a particular order. This declaration was  
14 prepared for *Linde* right? For *Linde v. Arab Bank*, the  
15 Politist. Is that right?

16 THE COURT: It's dated 2014.

17 MR. RADINE: Yeah. *Linde v. Arab Bank*, which  
18 is a case similar to this one in many ways in that it  
19 involves martyr payments. And in 31, for example, it  
20 notes that he affirms that the outlawed various  
21 institutions operating in the Palestinian territories  
22 deemed to be part of Hamas such as, and he names a number  
23 of entities, were published upon their designation.

24 To be clear, this is prepared for another case.  
25 It would be just as true for the HLF designation as we

## Proceedings

1 alleged that would, for example, have been designated by  
2 Israel. So the point being --

3 THE COURT: But you're not getting me to what I  
4 thought you were saying this declaration was going to get  
5 me to which is the conclusion that PIB had some Israeli  
6 law obligation to avoid dealings with Mr. Salem or ALF,  
7 are you?

8 MR. RADINE: As opposed to HLF?

9 THE COURT: Yes, that's what I'm asking about.

10 MR. RADINE: Right. Yeah. I think it's safe  
11 to say that the Israeli position in that time was that it  
12 was illegal to provide martyr payments and that there  
13 would be presumptive consequences for.

14 THE COURT: But you don't allege that in  
15 anything that I can see explicitly?

16 MR. RADINE: No. I mean it's inherently  
17 illegal to provide martyr payments. It violates American  
18 law, it violates -- I can't think of a place where it's  
19 not --

20 THE COURT: The bank is not subject to American  
21 law. Or maybe it is.

22 MR. RADINE: I can't think of a place, maybe  
23 outside of Iran, where that would be possibly legal.

24 THE COURT: I think you need to make that point  
25 explicit. I don't know if -- you had two efforts to

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1 amend here. I don't know that I would go through the  
2 entire process of writing an opinion. I don't know  
3 whether dismissal would be with prejudice or without.  
4 But if you think you might want leave to amend, you  
5 should be asking for it now rather than after an opinion  
6 on this subject comes out. I don't really see anything,  
7 other than these -- yes, you have paragraph 648 in the  
8 complaint that says that PIB was aware of international  
9 banking standards including the above referenced KYC  
10 guidelines. You say the U.S. is a member of the Basel  
11 Committee. I don't know what that tells us. And you  
12 have paragraph 650 which says PIB was subject to the  
13 rules promulgated by FATF. I'm not sure that FATF rules  
14 have the force of law independently. Do they? They have  
15 to be referenced by or incorporated into regulations by  
16 some governmental authority. FATF is just a task force,  
17 right? Does it make law for anybody?

18 MR. RADINE: I don't know the legal effect of  
19 FATF proclamations.

20 THE COURT: I think it might be your job to  
21 know more about bank regulation than --

22 MR. RADINE: Okay.

23 THE COURT: -- it seems like we do right now.

24 MR. RADINE: But again --

25 THE COURT: And to seek permission to amend the

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1 complaint and/or supplement the Politist declaration on  
2 that subject.

3 MR. RADINE: We'd be happy to do that. You  
4 know, I'll make that request. It certainly seems like  
5 the safe route.

6 Again, it's our position that there is nothing  
7 in *Kaplan* or *Honickman* that suggests that's a  
8 requirement. *Kaplan* --

9 THE COURT: I'll tell you where I think the  
10 requirement comes from. You can tell me if you don't  
11 agree. And I just randomly opened the *Twitter* case to  
12 headnotes 8, 9, and 10. "To keep aiding and abetting  
13 liability grounded in culpable misconduct, the criminal  
14 law of the United States," which I understand we're not  
15 dealing with here, "thus requires that a defendant in  
16 some sort associate himself with the venture, that he  
17 participate in it as something he wishes to bring about  
18 before he can be held liable. In other words, the  
19 defendant has to take some affirmative act with the  
20 intent of facilitating the offense's commission such as  
21 through words of encouragement or driving the getaway  
22 car."

23 And the *Twitter* opinion goes on to say that the  
24 key question is whether the defendants in the *Twitter*  
25 case gave such knowing and substantial assistance to ISIS

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1 that they culpably participated in the Reina attack.

2 Justice Thomas summarizes the applicable framework from

3 *Halberstam* and the common law generally, "as a framework

4 designed to hold defendants liable when they consciously

5 and culpably participated in a tortious act in such a way

6 as to help make it succeed."

7 And the opinion summarizes Twitter's

8 relationship with ISIS and its supporters as follows.

9 "It appears to have been the same as Twitter and

10 YouTube's relationship with their billion-plus other

11 users, arm's length, passive, and largely indifferent."

12 Arm's length, passive, and largely indifferent. No act

13 of encouraging, soliciting, or advising, rather the

14 plaintiffs, Justice Thomas says, "Essentially portrayed

15 the defendants as bystanders."

16 And then he goes on to say at some length that

17 the plaintiff's claims in the *Twitter* case "might have

18 more purchase if they could identify some independent

19 duty that would have required the defendants to remove

20 ISIS's content. But plaintiffs identify no duty that

21 would require defendants or other communication-providing

22 services to terminate customers after discovering that

23 the customers were using the service for illicit ends."

24 Let me just read that sentence one more time.

25 "Plaintiffs identify no duty that would require the

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1 defendants or any other communication-providing service  
2 to terminate customers after discovering that the  
3 customers were using the service for illicit ends."

4           So to me, I mean I could be misinterpreting my  
5 mandate here entirely but that makes it seem very  
6 relevant to me what the state of PIB's legal obligations,  
7 if not prudential ones, was.

8           MR. RADINE: But if I may, your Honor,  
9 obviously it's our view that they consciously and  
10 culpably assisted these terrorist attacks, did so  
11 knowingly and substantially to use the phrase. As for  
12 whether it was illegal, we can supply additional  
13 allegations of briefing on that but was it illegal to  
14 write the checks as in for Mr. Salem to write? Would we  
15 have to allege that it's illegal to pay the martyr  
16 payments?

17           The allegation is that they know, right? It's  
18 not an issue where they don't know there's a question  
19 of --

20           THE COURT: No, the Twitter -- Twitter is  
21 alleged to have known. Twitter knows ISIS has an  
22 account, a Twitter account. And YouTube knows that ISIS  
23 has a YouTube account --

24           MR. RADINE: Right.

25           THE COURT: -- on which it is recruiting the

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1 next generation of suicide bombers. That's the  
2 allegation. It was undisputed at the --

3 MR. RADINE: Well, it's alleged --

4 THE COURT: The point is --

5 MR. RADINE: -- that they shut down the  
6 accounts when they find them.

7 THE COURT: No. I mean maybe but I think  
8 you're misreading the Twitter case. What Justice Thomas  
9 is saying is absent some affirmative duty to screen your  
10 content, that if all Twitter is doing is providing the  
11 same service or all YouTube is doing is providing the  
12 same communication service to ISIS as they provide to  
13 anyone else, that's not enough for aiding and abetting  
14 liability. There has to be some manifestation that they  
15 were doing so culpably, meaning that they manifested a  
16 desire to see ISIS's activities succeed. No?

17 MR. RADINE: I just want to read the -- this is  
18 the lines I have on the record here from *Taamneh* is that  
19 the plaintiffs, sorry the defendants, "attempted to  
20 remove at least some ISIS sponsored accounts and content  
21 after they were brought to their attention." The  
22 allegation is that -- I believe this is also -- that's at  
23 1226 note 13. I believe it is also a direct quote that  
24 Twitter is accused of having "failed to detect ISIS  
25 accounts." That I'm not --

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1 THE COURT: I think you misunderstand. I'm  
2 talking about the *Twitter* case. You're reading from  
3 other cases.

4 MR. RADINE: That's *Twitter*. Sorry.

5 THE COURT: I think you're misreading the  
6 *Twitter* case.

7 MR. RADINE: Your Honor, that's a line from  
8 *Twitter*.

9 THE COURT: What is the line?

10 MR. RADINE: The defendants, and I'm adding  
11 that, "attempted to remove at least some ISIS sponsored  
12 accounts and content after they were brought to their  
13 attention." That's at 1226 --

14 THE COURT: But so what? And the court in  
15 *Twitter* makes what of that fact?

16 MR. RADINE: That they were not consciously and  
17 culpably assisting ISIS's actions. They had at best very  
18 generalized -- sorry, at best very generalized knowledge  
19 that --

20 THE COURT: Do you think that if not for the  
21 allegation that Twitter, YouTube on occasion had removed  
22 or suppressed content by ISIS the complaint would have  
23 gone forward past the motion to dismiss stage? That's  
24 how you read *Twitter*?

25 MR. RADINE: I think combined with the fact



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1 that they had billions of customers and that the  
2 allegation is that they failed to detect ISIS's accounts,  
3 I do think so. I think it's a far cry from, you know,  
4 helping cut checks that say martyr on them that are being  
5 given in public ceremonies.

6 THE COURT: What does that mean helping -- they  
7 didn't cut the checks. They processed the checks.

8 MR. RADINE: No, they processed the checks.  
9 Right. So they know that the checks were being written.  
10 They receive them back when they're --

11 THE COURT: How do you know that? How do you  
12 know a computer is not the one arranging all these  
13 payment processing?

14 MR. RADINE: A computer? You mean --

15 THE COURT: How do you know a human puts eyes  
16 on a check that says martyr on it?

17 MR. RADINE: Well, I think that knowledge on a  
18 computer is imputed to their corporation. I don't think  
19 that they're allowed to robotically ignore it. But  
20 they --

21 THE COURT: No, but then you would have the  
22 same rule apply to *Twitter*? That every single thing  
23 that -- or to YouTube, that every single thing that was  
24 said on a YouTube video --

25 THE COURT: Even if they were -- the checks, we

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1 explain in the brief, the checks come back when they're  
2 cancelled. But even if --

3 THE COURT: And who looks at them and for what  
4 purpose?

5 MR. RADINE: A PIB staffer because they're not  
6 going to pay the counterparty bank if they think that the  
7 transaction is one that, for example, Rakad Salem can't  
8 cover in his account. Or if it's a fraud.

9 THE COURT: Where do you allege in the  
10 complaint that a human puts eyes on these cancelled  
11 checks?

12 MR. RADINE: I don't know exactly where I have  
13 the allegation that it's a human versus a computer.

14 THE COURT: Is somebody at your table trying to  
15 find that now?

16 MR. RADINE: I doubt it. But in addition to  
17 that, I would add that they know who their customer is  
18 and they see that Rakad Salem, a popular figure according  
19 to the press, is handing out these checks in public  
20 ceremonies to great fanfare. There's not even, to use  
21 your Honor's word, a prudential interest and maybe just  
22 taking a quick look at that account and seeing if the  
23 checks say martyr on them for example

24 THE COURT: Where does the interest come from  
25 that they may be cut off from being able to do business

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1 with Jordanian banks?

2 MR. RADINE: That or maybe closed by Israel or  
3 perhaps they simply believe in the value of human life.

4 THE COURT: No, but Google and Twitter should  
5 also believe in the value of human life given that human  
6 life is precious. And yet the Supreme Court says that  
7 despite -- so here are the allegations. It's Facebook,  
8 YouTube, and Twitter. Plaintiffs allege that ISIS and  
9 its adherents have used these platforms for years for  
10 recruiting, fund raising, and spreading propaganda. ISIS  
11 and supporters opened accounts on Facebook, YouTube, and  
12 Twitter and uploaded videos and messages for others to  
13 see. Those videos and messages were then matched with  
14 other users based on those users' information and  
15 history. And ISIS's videos and messages both celebrated  
16 terrorism and recruited new terrorists.

17 MR. RADINE: If I may, your Honor --

18 THE COURT: ISIS uploaded videos that fund  
19 raised for weapons of terror and that showed brutal  
20 executions of soldiers and civilians alike. These  
21 platforms plaintiffs allege were crucial to ISIS's growth  
22 allowing it to reach new audiences, gain new members, and  
23 spread its message. And plaintiffs also allege that the  
24 defendants have known that ISIS has used their platforms  
25 for years. And plaintiffs aver that the defendants have

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1 failed to implement even a basic account detection  
2 methodology. Not only have they failed to implement that  
3 basic account detection methodology, the platforms have  
4 knowingly allowed ISIS and its supporters to benefit from  
5 the platform's recommendation algorithms.

6 You need to show something more than knowledge.  
7 You keep saying knowledge, but you need to show something  
8 more, you know, that their interest in the venture was  
9 something more than passive.

10 MR. RADINE: I think if that's the case, then  
11 this Court will have to find that *Twitter* overruled  
12 *Honickman* and *Kaplan* which has not been the case.

13 For example, this Court, as in the eastern  
14 district in *Zobay*, found that *Kaplan* and *Honickman* still  
15 stand. And *Bonacasa*, where they decided they didn't have  
16 to find --

17 THE COURT: So if *Twitter* requires that you do  
18 something more for a given client than you would do for  
19 all your clients, then *Kaplan* satisfies that requirement  
20 because the *Kaplan* plaintiffs pleaded that the alleged  
21 terrorists who were clients of LCB were accorded special  
22 treatment.

23 MR. RADINE: Well, *Taamneh* says that there's  
24 some things you can provide. They give you an example  
25 of -- I think they have the pharmaceuticals to a drug

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1 dealer that are inherently dangerous enough. I think  
2 martyr payment checks meet that requirement pretty  
3 easily. Otherwise you can have someone walk into your  
4 gun shop, say I'm off to kill somebody --

5 THE COURT: I don't think that's the level of  
6 specificity. The gun is inherently dangerous. A check  
7 is not inherently dangerous.

8 MR. RADINE: But it says martyr on it.

9 THE COURT: But then you're just back to the  
10 question of whether somebody looked at the check or not  
11 and you're not --

12 MR. RADINE: No, the --

13 THE COURT: Like you can't -- do you allege, I  
14 ask again, anywhere in the complaint that somebody put  
15 eyes on these checks, some human at PBI put eyes on these  
16 checks?

17 MR. RADINE: No. The *Honickman* requirement,  
18 you do not have to show that they were read or were aware  
19 of knowledge facts. That's a quote I can give to the  
20 Court.

21 THE COURT: Well, but you're telling me a check  
22 is inherently dangerous when it says the word martyr on  
23 it and I'm saying that as a matter of common sense that's  
24 only the case if somebody, some human is reading the word  
25 martyr.

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1 MR. RADINE: Or reading --

2 THE COURT: Otherwise it's just a check. It's  
3 not the provision of guns or, you know, whatever the  
4 fertilizer is that's used in explosives. It's just a  
5 check.

6 MR. RADINE: Except that it is in dozens and  
7 dozens of news articles which is sufficient under  
8 *Honickman* that says that these checks are being handed  
9 out as martyr payments. And under *Honickman* it says that  
10 the, sorry, page 11, "As explained in *Kaplan*, plaintiffs  
11 did not need to allege that defendant bank knew or should  
12 have known of the public sources at the pleading stage.  
13 Such a requirement at this juncture would be too  
14 exacting."

15 THE COURT: This is pre-*Twitter*?

16 MR. RADINE: Yes, but *Twitter* did not change  
17 the standard of knowing the facts. It changed what we  
18 allege nothing, but presumably introduced this passive  
19 versus affirmative conduct distinction whereas here it's  
20 affirmative conduct, as much as we did in -- or sorry, as  
21 much as the plaintiffs to in *Bonacasa* where it's  
22 sufficient, or *Zobay* where it's sufficient, or *King* where  
23 it's sufficient.

24 In *Bonacasa*, the defendant is giving the  
25 argument, from the defendant at least, is that they're

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1 providing financial services to a completely legal  
2 fertilizer company that they were warned was producing  
3 fertilizer that was being used in bombs in Afghanistan.  
4 Well, we allege that PIB is providing illegal services to  
5 illegal entities to provide martyr payments much as they  
6 were in *Linde*, your Honor.

7 THE COURT: Illegal under what law? U.S. law?

8 MR. RADINE: Certainly under U.S. law. I have  
9 to imagine it's illegal under Israeli law. I don't think  
10 there's a single place where it's not.

11 I point out that in *Twitter*, by the way, the  
12 phrase is, "As *Halberstam* makes clear, people who aid in  
13 abet a tort can be held liable for other torts that were  
14 a foreseeable risk of the intended tort." It's illegal  
15 or tortious conduct.

16 So even in the universe, your Honor, where it  
17 is somehow legal to pay for suicide bombing, bounties,  
18 which I don't think is true anywhere, it must be  
19 tortious. It can't possibly be an innocent act. It's an  
20 evil act, your Honor, to pay suicide payment bounties or  
21 to help move Saddam Hussein's money, an allegation the  
22 Second Circuit credited in our appeal.

23 THE COURT: I think you're saying, if I  
24 understand you correctly, that once you establish  
25 knowledge, thank you, that once you establish knowledge,

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1 intent follows like day follows night. There's no  
2 additional step from knowledge.

3 MR. RADINE: They act on it certainly. Right?  
4 They have the -- they're continuing to let the checks, to  
5 pay on the checks, right? The check goes out --

6 THE COURT: But how is that different from  
7 YouTube and Twitter?

8 MR. RADINE: In fact, the Supreme Court  
9 distinguished Google from YouTube and Twitter by saying  
10 that Google was sharing revenue with ISIS and did not  
11 call that conduct passive. It simply said it didn't have  
12 any sense of what the amount was and said it might have  
13 been as little as \$50 is what Justice Thomas wrote. But  
14 we've alleged \$9.5 million for PIB alone, if not more,  
15 because the total of Saddam Hussein's payments to ALF was  
16 \$35 million.

17 THE COURT: Point me to the part of *Honickman*  
18 that you want me to read here.

19 MR. RADINE: It is page 501.

20 THE COURT: Which paragraph?

21 MR. RADINE: Sorry, I'm looking at it in  
22 quotation form here, your Honor. It says, "As we  
23 explained in *Kaplan*, plaintiffs do not need to allege  
24 that LCB knew or should have known the public sources at  
25 the pleading stage. Such a requirement at this junction



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1 would be too exacting."

2 THE COURT: Right. So in other words, when you  
3 say public sources, you mean public media sources.

4 MR. RADINE: Right.

5 THE COURT: So at this stage we don't require,  
6 you allege, that a human inside PIB read the daily  
7 telegraph --

8 MR. RADINE: Correct.

9 THE COURT: -- or the French press agency. I  
10 get that. But that's different from the requirement that  
11 somebody inside PIB read the Salem checks. No?

12 MR. RADINE: I don't think so, your Honor. I  
13 have no -- it's too exacting, your Honor, because I don't  
14 have any --

15 THE COURT: Maybe not. Yes. Maybe --

16 MR. RADINE: I have no insight into the  
17 operations of PIB at the pleading stage. We will ask  
18 them during discovery how they look at their checks.

19 THE COURT: So you think it's a reasonable  
20 inference that a human is putting eyes on every cancelled  
21 check that comes back to PIB?

22 MR. RADINE: Yes. And I think it's a  
23 reasonable inference that when you have the imputable  
24 knowledge under *Honickman* that you're holding an account,  
25 a checking account, for a popular figure who issues

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1 martyr checks, that you would then put eyes on those  
2 checks.

3 THE COURT: Yes. I still say that is eminently  
4 more plausible if the bank has some legal or prudential  
5 incentive to care who its clients are rather than just a  
6 moral incentive that you're positing. It may be that  
7 there's more you can say on that subject by way of an  
8 amended complaint or an update Politist declaration.

9 But otherwise, I think you may have a  
10 *Twitter* -- you may bump up against *Twitter's* knowledge  
11 versus -- *Twitter*, I read *Twitter* rightly or wrongly to  
12 say that we need to see some manifestation of rooting  
13 interest, rooting R-O-O-T-I-N-G, interest. And that if  
14 they are otherwise just treating this customer the same  
15 way they treat all their other customers, then you don't  
16 get that.

17 MR. RADINE: I'm not sure how that would be  
18 distinguished. I mean not that you're bound by that, but  
19 by any of the other decisions that have survived the  
20 *Twitter* analysis like *Zobay* or *Bonacasa*.

21 THE COURT: What do you mean when you say they  
22 survived the *Twitter* analysis?

23 MR. RADINE: I mean that the defendants in  
24 those cases have moved either for reconsideration or some  
25 other device and the court has ruled on them.

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1 THE COURT: What's the most reasoned opinion in  
2 that vein where a judge is explaining why *Twitter* doesn't  
3 change anything or doesn't change that analysis?

4 MR. RADINE: Let me bring up the line here from  
5 *King*. I can give you a few quotes. In *King* the court  
6 said the holdings in *Twitter* largely align with the  
7 Second Circuit precedent and cited in *King I*, which is  
8 *Linde, Honickman, and Kaplan*. There's another analysis  
9 in *Zobay* which is Judge Amon's case. I can give you the  
10 cite. It's a Lexis cite. 2023 U.S. Dist. Lexis 176598.  
11 And then *Bonacasa*, which says that it doesn't have to  
12 change, it doesn't have to review the effect on Second  
13 Circuit law because the allegations there were sufficient  
14 under *Twitter* -- I happen to have the Westlaw one here.  
15 A little variety. 2023 WL 7110774.

16 THE COURT: That's *Zobay* you're --

17 MR. RADINE: That last one was *Bonacasa*.

18 THE COURT: Okay.

19 MR. RADINE: The *Standard chartered*. The  
20 second one was *Zobay*. The first one was *King v. Habib*  
21 *Bank*.

22 So those are all cases in which the issue of  
23 knowledge isn't coming from a duty, it's coming from  
24 evidence that the plaintiffs had whether it was a warning  
25 given to Standard Chartered in *Bonacasa*, whether it was

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1 language I believe in an agreement in *Zobay*, or here  
2 whether it's publicly available information that  
3 *Honickman* explained was sufficient.

4 THE COURT: Okay. All right. We've gone over  
5 by time.

6 So I'm interested in everything that defendant  
7 wants to say by way of rebuttal and also whether you want  
8 to be heard at this point on the question of leave to  
9 amend or not.

10 MR. BERGER: If your Honor has time, I would  
11 like to try to address all the Court's questions.

12 Number one, your Honor is correct FATF  
13 standards are not self-executing. They must be adopted  
14 by the jurisdiction in question. There's no allegation  
15 in the second amended complaint that that happened.

16 THE COURT: Well, there is. There's an  
17 allegation, it may not be plausible, in paragraph 60 that  
18 PIB was subject to the rules promulgated by FATF.

19 MR. BERGER: Well --

20 THE COURT: You're just saying that's wrong.

21 MR. BERGER: It is wrong, your Honor. And the  
22 Court is entitled to take judicial notice. Part of the  
23 problem, your Honor, is what we're hearing in argument  
24 and in the brief are things that are not in the second  
25 amended complaint. Let me give you the example. Your

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1 Honor said where's the allegation that somebody at PIB  
2 puts eyes on the check? It's not there. Everybody at  
3 their table could look and everybody at this table could  
4 look. Footnote 2 at page 11 --

5 THE COURT: Just pause on that for a second.  
6 All this Second Circuit law that is very specific that  
7 there's look, you don't have to have an allegation that  
8 somebody inside the bank is reading a particular  
9 newspaper article at this stage. That would be too much  
10 to ask for. Why wouldn't that same principle apply to  
11 the plausibility analysis regarding whether some human at  
12 PIB puts eyes on the check?

13 MR. BERGER: Because -- and your Honor, there's  
14 a couple of parts to this. I'll do it as quickly as  
15 possible. The error -- *Honickman* is inconsistent with  
16 *Twitter*. It cannot be reconciled. It says there's no  
17 difference. *Taamneh* says that's wrong. That's the Ninth  
18 Circuit's error. What *Kaplan* and *Honickman* could be said  
19 still to stand for is that public reports, and then we'll  
20 get to your Honor's analogy, are probative of general  
21 awareness but they cannot be probative of the actual  
22 knowledge required for knowing and substantial  
23 assistance. I understand the Second Circuit hasn't yet  
24 said you know, *Honickman* is inconsistent with *Twitter* but  
25 it's going to say that my next point.

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1 In the *Wildman* decision, as your Honor probably  
2 knows, *Wildman* is the first post *Twitter* bank liability  
3 case that has gone to the Second Circuit. It was argued  
4 on March 13th or 14th. And there, the Second Circuit is  
5 grappling with how to reconcile the inconsistent aspects  
6 of *Honickman* in particular and *Kaplan* with *Wildman*.

7 THE COURT: How do you know that, that they're  
8 grappling with that? Did you listen to the oral  
9 argument?

10 MR. BERGER: I listened to the oral argument.  
11 But none of us has to guess, your Honor. What I was  
12 going to say, your Honor asked me my view of that  
13 amendment. If you're going to amend and we care what the  
14 rules of the road are, as we all do, then perhaps the  
15 thing to do is wait to see what *Wildman* tells us and let  
16 them make their amendments, and then we won't have to  
17 guess.

18 THE COURT: When was the argument?

19 MR. BERGER: March 13th or 14th. 14th or 15th.

20 THE COURT: Second Circuit. I mean think about  
21 how long the Second Circuit took in this case.

22 MR. BERGER: Right.

23 THE COURT: I'll listen to the argument though.

24 MR. BERGER: So here -- I apologize, your  
25 Honor.

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1 THE COURT: Let me just make a note here. You  
2 want me to mind the distinction between general  
3 awareness, between what is too much to ask at the  
4 pleading stage, you say that applies to the general  
5 awareness question but not the specific --

6 MR. BERGER: Precisely, precisely. And I think  
7 part of the reason is one of the things that *Twitter*  
8 said, and it's very important, and your Honor was reading  
9 a number of these points, which is that aiding and  
10 abetting has to be interpreted based on the sort of  
11 common conceptual core of aiding and abetting liability  
12 as it has existed for a long time. I can give your Honor  
13 the cite to that if you want.

14 But my point here is by doing so -- that's at  
15 598 U.S. 493.

16 THE COURT: You're talking about the language  
17 in, I'm calling it the *Twitter* case, you're calling it  
18 *Taamneh*.

19 MR. BERGER: I'll call it whatever your Honor  
20 wants.

21 THE COURT: At the beginning of page 504, it  
22 says the knowledge and substantial assistance components  
23 should be considered relative to one another. The  
24 knowing part of that inquiry is not the same as the  
25 general awareness that defines *Halberstam's* second --

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1 MR. BERGER: Precisely, your Honor. And that  
2 is the -- they can say all they want, that the Second  
3 Circuit has not formally said that *Honickman* is wrong  
4 when it said nothing more is required for knowing  
5 substantial assistance than is required for general  
6 awareness.

7 THE COURT: Thank you.

8 MR. BERGER: But the law is quite clear that  
9 when the Supreme Court decision undermines the basis for  
10 an appellate opinion, it is no longer sound to rely on  
11 that.

12 The other key part of *Taamneh* is that it said  
13 you got to interpret JASTA not so it's text that has to  
14 be interpreted in light of *Halberstam*, but in light of  
15 the common core of aiding and abetting liability. And I  
16 would say that one of the things that's highly  
17 instructive, particularly since *Twitter* said one of our  
18 concerns is to avoid imposing liability on mostly passive  
19 actors like banks for processing routine transactions of  
20 their customers.

21 THE COURT: *Twitter* did not say like banks, did  
22 it?

23 MR. BERGER: Yes, your Honor. I'll give you  
24 the precise quote. The quote in -- it's at page 143,  
25 Supreme Court 1222, but it's -- and I'll get the U.S.



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1 cite in a moment --

2 THE COURT: No, I'll get there.

3 MR. BERGER: It says that the whole purpose of  
4 these safeguards is to prevent mostly passive actors like  
5 banks being, I'm adding that, liable for all of their  
6 customers' crimes by virtue of carrying out routine  
7 transactions.

8 So it did specifically express the concern that  
9 we're wrestling with here. The answer to that concern is  
10 two things are required, actual knowledge, which we've  
11 talked about quite a bit today, and affirmative  
12 misconduct. Your Honor pointed it out, there has to be  
13 some manifestation of a set or support --

14 THE COURT: I'm looking at -- you said 1222?

15 MR. BERGER: Yes, your Honor.

16 THE COURT: I'm still missing --

17 MR. BERGER: That's the Supreme Court, the  
18 Supreme Court Reporter.

19 THE COURT: Yes.

20 MR. BERGER: I will get the U.S. citation right  
21 now.

22 THE COURT: Oh, passive actors like banks. I  
23 got it. That's mostly passive actors like banks. I had  
24 missed that.

25 MR. BERGER: There's a rich body of aiding and

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1 abetting law developed in the Second Circuit and  
2 elsewhere on aiding and abetting liability for banks.  
3 That's immediately relevant.

4 THE COURT: The Supreme Court is not saying  
5 this though. The Supreme Court is just talking about  
6 what other courts have said maybe with a little bit of  
7 approval. Still others, meaning other courts, have  
8 explained the culpability of some sort is necessary to  
9 justify punishment of a secondary actor lest mostly  
10 passive actors like banks become liable. And they cite  
11 this Third Circuit case from 1978.

12 I don't draw that much comfort for your client  
13 from that because (A), banking regulation in 1978 was a  
14 very different thing. You could walk in 1978, you know,  
15 into a bank with a suitcase full of cash and they would  
16 accept the deposit. And the *Twitter* case goes on to say  
17 all that stuff that I quoted about how the *Twitter* case  
18 might be different if there was some affirmative duty.

19 MR. BERGER: Right. And so your Honor, I think  
20 that immediately takes us to the language in *Twitter*.  
21 Forget about reasoning by analogy from that language  
22 about holding banks liable. This is to quote 143 Supreme  
23 Court at 1221. "The defendant must take some affirmative  
24 act with the intent of facilitating the offense's  
25 commission." And on page 1227, it rules out relying on

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1 passive nonfeasance. Absent a duty, as your Honor has  
2 been --

3 THE COURT: Well, that's just saying that you  
4 can't be a bystander. But obviously, somebody who's  
5 providing -- you know, PIB's taking affirmative acts. I  
6 think what we're talking about is whether it's with the  
7 intent of facilitating the offense's commission.

8 MR. BERGER: No, your Honor. I don't think  
9 we're even trying to say that they're taking an  
10 affirmative act. And this is a point, and let me just --  
11 I don't know --

12 THE COURT: Clearing and settling -- writing,  
13 processing checks. Southern District of New York  
14 decision on aiding and abetting liability. And I'm  
15 quoting here from *Zamora v. JPMorgan Chase Bank*, 2015 WL  
16 4653234 \*3 (SDNY Jul. 31, 2015). And this is in the  
17 context of bank aiding and abetting liability made  
18 germane by *Twitter*. "Routine banking services including  
19 processing checks do not constitute substantial  
20 assistance."

21 THE COURT: Can you just -- I'm finding it hard  
22 to follow you from one step of your logic to the next.  
23 You were talking about whether your client had taken any  
24 affirmative act.

25 MR. BERGER: Right.

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1 THE COURT: Not whether they provided  
2 substantial assistance which is a whole other can of  
3 worms. And I said it seems obvious to me that  
4 maintaining accounts and clearing check payments is an  
5 affirmative act. And then you switched to some analysis  
6 of substantial assistance.

7 MR. BERGER: That's because substantial  
8 assistant is the affirmative act that the Supreme Court  
9 has in mind in *Twitter*. Substantial assistance. There's  
10 two aspects, right? This is what *Twitter* is talking  
11 about. Knowing, substantial assistance. The actual  
12 knowledge piece, first requirement, is the knowledge  
13 piece. The substantial assistance piece is the same  
14 thing as an affirmative act. That's the whole purpose of  
15 saying substantial assistance and knowing substantial  
16 assistance.

17 THE COURT: Say the name of the district court  
18 case you're saying again?

19 MR. BERGER: *Zamora, Z-A-M-O-R-A, v. JPMorgan*  
20 *Chase Bank*.

21 THE COURT: It stands for the proposition you  
22 say that clearing checks can never be substantial  
23 assistance?

24 MR. BERGER: It says routine banking services,  
25 including processing checks, do not constitute

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1 substantial assistance.

2 THE COURT: And it says that based on what?

3 MR. BERGER: It says that based on the fact  
4 that banks have to do something more than engage in  
5 routine activity.

6 THE COURT: Who says? Like what's the  
7 authority? *Zamora* is not binding on me, right?

8 MR. BERGER: None of this, your Honor, is going  
9 to be binding until *Wildman* comes out. But what is  
10 binding from Twitter is that the body of aiding and  
11 abetting case law that exists out there for which there  
12 are particularized applications to banks is to be  
13 consulted in determining both the knowing element --

14 THE COURT: Yes, consulted to the extent it  
15 might be persuasive. But if you just says --

16 MR. BERGER: But here's what it says --

17 THE COURT: -- this is not substantial  
18 assistance and doesn't explain why, then what utility is  
19 there?

20 MR. BERGER: Because it leads to the next point  
21 which resonates with something your Honor has pointed out  
22 repeatedly, and I want to make sure this is the Politist  
23 declaration as well, which is that the line drawn in this  
24 case law is the same line drawn in *Kaplan* which is in  
25 order to determine if something is an affirmative act by

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1 a bank, there has to be atypical bank behavior that lacks  
2 business justification --

3 THE COURT: Where do you see that in *Kaplan*,  
4 atypical business behavior?

5 MR. BERGER: I will turn to that right now,  
6 your Honor. Where I see that is in *Kaplan* at 999 F.3d  
7 858 talking about the special exceptions that LCB made to  
8 favor its customers, that reference about special  
9 exceptions.

10 THE COURT: So you're saying that the Second  
11 Circuit just noted the fact. I thought you were going to  
12 point me to the place where the Second Circuit says you  
13 have to have atypical business activity, that business as  
14 usual is not enough.

15 MR. BERGER: Well, I don't think the Second  
16 Circuit has said that yet, but a whole body of case law,  
17 including an Eastern District of New York case and a  
18 Southern District of Florida case I could cite to your  
19 Honor that deals with bank aiding and abetting liability  
20 makes it clear that substantial assistance for aiding and  
21 abetting requires, and here I'm quoting, "atypical bank  
22 activities."

23 THE COURT: What are you quoting?

24 MR. BERGER: I'm quoting Southern District of  
25 Florida 2023 case that is consistent also with an Eastern

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1 District of New York case. I'll give the Court both  
2 citations if the Court would like.

3 THE COURT: Just give me the names.

4 MR. BERGER: *Rusty115 Corp. v. Bank of America.*

5 THE COURT: That's the Florida case?

6 MR. BERGER: That's the Florida case. The  
7 Eastern District of New York case is *HSA Residential*  
8 *Mortgage Services v. State Bank of Long Island*. That's  
9 2006.

10 THE COURT: Those don't sound like terrorism  
11 financing cases to me.

12 MR. BERGER: No, they're not, your Honor. They  
13 are precisely what I said they were which is bank aiding  
14 and abetting liability cases that *Twitter* makes directly  
15 germane to JASTA when *Twitter* says you have to interpret  
16 JASTA against the common core of aiding and abetting  
17 liability as it has existed for decades. That is not an  
18 idle reference. That's where Justice Thomas is saying  
19 don't engage in sort of some text parsing of JASTA or of  
20 analogizing to *Halberstam* consider the body of aiding and  
21 abetting law as it has existed for decades.

22 THE COURT: Okay.

23 MR. BERGER: That drove us back to looking at  
24 the aiding and abetting law as it existed for decades.

25 THE COURT: All right. Do you want to be heard

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1 on the subject of leave to amend?

2 MR. BERGER: Yes, your Honor. I mean I --

3 THE COURT: You can be heard in writing if you  
4 prefer.

5 MR. BERGER: If they want to amend, then let's  
6 make sure we're addressing the allegations they have.  
7 We're not going to -- if your Honor is inclined to grant  
8 them leave to address the points your Honor's talking  
9 about, then let's get that done now so that we don't have  
10 to be taking up more of the Court's resources dealing  
11 with what will be a dead complaint.

12 THE COURT: Agreed. Yes, I don't want to write  
13 a long opinion on the subject only to then have to deal  
14 with a request for leave to amend on this point about the  
15 bank's obligations, legal and prudential. I'm trying to  
16 think whether there was anything else today that might --

17 MR. BERGER: The Politist declaration. I think  
18 your Honor had that in mind.

19 THE COURT: Yes, the --

20 MR. BERGER: Which is -- it's important to note  
21 the Politist declaration --

22 THE COURT: That's the same subject though.  
23 I'm trying to think whether there was a second subject.  
24 The second subject is the question of whether anybody  
25 inside a bank as a matter of fact would be likely to put



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1 eyes on the memo section of a check in the ordinary  
2 course of clearing and settling check payments. Is that  
3 clear enough?

4 MR. RADINE: Yes, your Honor. Do you, since  
5 you mentioned doing it in writing, do you mind if we --

6 THE COURT: I think we just heard that leave to  
7 amend is not opposed.

8 MR. RADINE: All right.

9 THE COURT: So I'm granting leave to amend.

10 MR. RADINE: Okay.

11 THE COURT: Correct? You do not oppose leave  
12 to amend?

13 MR. BERGER: That is correct, your Honor.

14 THE COURT: Okay. So leave to amend is  
15 granted. I think you've seen my individual rules about  
16 submitting a blackline --

17 MR. RADINE: Okay.

18 THE COURT: Leave to amend is granted for the  
19 purposes that we've discussed today. And if you have any  
20 questions or confusion about that, let me know and we'll  
21 get on a phone call. I'm not anticipating that you're  
22 going to add additional counts or additional defendants  
23 or --

24 MR. RADINE: No, not at all.

25 THE COURT: -- anything like that. But the two

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1 subjects I mentioned are (A), the contours and the source  
2 of any obligations this bank has to know its customers  
3 and to avoid being in the terrorism financing business  
4 and (B), any factual allegations in respect of whether  
5 banking in the ordinary course in the Palestinian  
6 territories in 2001 and '02 can plausibly be understood  
7 to have required humans to put eyes on checks.

8 Anything else that I'm missing from the  
9 plaintiff's perspective?

10 MR. RADINE: We have a question we'll write to  
11 the Court on that.

12 THE COURT: Okay.

13 MR. RADINE: 60 days for the amended complaint.  
14 We have to dig around in historical Israeli and  
15 Palestinian records I imagine.

16 THE COURT: 60 days is fine. Let's set a  
17 schedule now whereby -- what's a reasonable amount of  
18 time for the defendants? You don't need to submit a full  
19 blown motion to dismiss if you think that would be less  
20 efficient than just a supplemental letter.

21 MR. BERGER: Your Honor, obviously I don't know  
22 until I see their amended complaint. And I'm happy not  
23 to have your Honor lock into either a schedule or  
24 whatever at this point or a format. All I know is that  
25 they're going to take 60 days for a second amended

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1 complaint and we'll need a minimum of 60 days to file  
2 whatever our response is.

3 THE COURT: Well, you can be doing the same  
4 research during those 60 days that they are about state  
5 of bank regulation. I think we should plan to hear from  
6 the defense within 30 days after the plaintiff's amended  
7 complaint comes in in a letter not to exceed five single  
8 spaced pages telling me whether in your view the amended  
9 complaint, the amendments do or do not make a difference.  
10 And I suppose as a theoretical matter you can answer the  
11 complaint if you decide they do make a difference such  
12 that you no longer wish to pursue a 12(b)(6) motion. But  
13 if you need additional time, you can ask for it.

14 MR. BERGER: Thank you, your Honor. And their  
15 response to the letter or is there a schedule to --

16 THE COURT: Yes. And then a response also five  
17 pages or less from the plaintiffs let's call it two weeks  
18 after you get the defense letter. So 60 days, just put  
19 specific dates to all of this, 60 days from today is July  
20 12th. Thank you.

21 MR. RADINE: We might file the complaint early  
22 if you want to just set out the amount of time between  
23 like you did, the 30 days and two weeks rather than give  
24 those dates because if we file the complaint early --

25 THE COURT: All right. And then 30 days post

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1 the filing of the complaint for the defense letter and  
2 then 14 days post that for the plaintiff's response. I  
3 don't think we need --

4 MR. BERGER: At risk of wearing out whatever is  
5 left of my welcome mat, do I get a reply?

6 THE COURT: You do not.

7 MR. BERGER: Thank you.

8 THE COURT: We're, you know, really zooming in  
9 here on a pretty specific issue and I think these two  
10 letters will get us where we need to go.

11 All right. Anything, not argument wise, but  
12 just logistically, anything else we need to do in terms  
13 of setting dates or managing the calendar from the  
14 defense perspective?

15 MR. BERGER: I don't think so, your Honor. If  
16 the *Wildman* decision comes out in the midst of all these  
17 of course I'm sure both sides will inundate the Court  
18 with their views on it.

19 THE COURT: Yes. And any other supplemental  
20 authority. I assume there are JASTA cases pending in  
21 other circuits as well. You know, if there are district  
22 court decisions, I'm interested in them to the extent  
23 they set out their reasoning in a way that I might find  
24 persuasive. Circuit Court decisions I'm interested in  
25 regardless.

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1 Anything else logistically from the plaintiff's  
2 side?

3 MR. RADINE: No, your Honor.

4 THE COURT: All right.

5 MR. BERGER: One question, your Honor, if I  
6 may, just on logistics. The disposition of the motion  
7 then is that it's either held in abeyance or denied  
8 without prejudice? It's unclear to me what the outcome  
9 is.

10 THE COURT: I would think the only reason  
11 anybody in this room would care is because judges have  
12 the six month list as a shaming device. If you have a  
13 preference between denied without prejudice or, you know,  
14 what do you prefer?

15 MR. BERGER: Well, I prefer it be granted with  
16 prejudice, but since that's not on the table, I would say  
17 how about granted with leave to amend?

18 THE COURT: Your motion to dismiss is granted  
19 with leave to amend? No. The question is whether -- the  
20 decision is under advisement for the time being and -- so  
21 I'm sorry, what was the last day in all this that we --

22 THE CLERK: So it would be 60 days, so July  
23 12th and then 30 days from that is --

24 THE COURT: August, like end of August. That  
25 will give us a month to decide this. I'll think about

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1 that. But everybody will know that whatever technical  
2 disposition is recorded is of limited import all around.

3 All right. Thank you, all. I've kept you way  
4 beyond your appointed lunch hour. I think we were  
5 supposed to have had a trial going on this week which is  
6 why we scheduled oral argument for the fairly unusual 12  
7 noon slot.

8 Thank you. This has been I think well briefed  
9 and argued all around and I think the supplemental  
10 briefing will only sharpen the issues. We'll endeavor to  
11 get something out in response as quickly as I can once  
12 the briefing is full. And with that, we'll be adjourned.

13 MR. BERGER: Thank you, your Honor.

14 MR. RADINE: Thank you, your Honor.

15 THE COURT: Thank you.

16 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 15th day of May, 2024.

  
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